THE FCC HAS THE AUTHORITY TO PARTIALLY SUNSET THE PROGRAM ACCESS RULES' EXCLUSIVITY RESTRICTION

The Commission's task in this proceeding is to determine whether the "prohibition" on exclusive contracts required by Section 628(c)(2)(D) "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming." Under this standard, the Commission is not left with only the binary choice of complete repeal or total extension of the ban. To the contrary, the Commission has the clear authority to permit the ban to sunset in part. Such a result is compelled to the extent the Commission does not find that re-enacting the ban is "necessary."

There are at least four bases for a partial sunset.

First, the Commission's authority to partially sunset the ban is consistent with general principles of statutory construction. The Commission's authority to fully retain the exclusivity ban or let it totally expire necessarily implies the power to let the restriction expire in part.[1/] Under generally applicable principles of statutory construction, a partial sunset it clearly permissible.[2/] A partial sunset could be considered impermissible only if such action exceeded the scope of authority delegated to the Commission,[3/] which it does not.

1/ *United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993) ("the grant of a greater power necessarily includes the grant of a lesser power, unless the authority to exercise the lesser power is expressly reserved"); *American Hospital Association v. Bowen*, 834 F.2d 1037, 1052 (D.C. Cir. 1987) ("the greater authority of an agency to review all hospital activity includes the lesser authority to train its reviewing resources on a subset of that activity likely to include a heavier dose of abuse"); *United States v. Watashe*, 102 F.2d 428, 430 (10th Cir. 1939), *quoting Mott v. United States*, 283 U.S. 747, 751 (1931) (the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control").

2/ *See e.g., United States v. Chesapeake & Ohio Railway Co.,* 426 U.S. 500, 514 (1976) (upholding agency decision to pursue "more measured course" of conditioning rate approval, as "a legitimate, reasonable, and direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation"); *Connecticut Fund for the Environment v. Environmental Protection Agency*, 672 F.2d 998, 1006 (2nd Cir. 1982) (rejecting claim that statutory "approve or disapprove" language precluded EPA from adopting "a measured course that may be more precisely tailored to particular circumstances than the all-or-nothing choice of outright approval or disapproval"); *McManus v. C.A.B.* 286 F.2d 414, 419 (2nd Cir. 1961)(Conditional approval is "inherent in the power to approve or disapprove. We would be sacrificing substance to form if we held invalid any conditional approval but affirmed an unqualified rejection accompanied by an opinion which explicitly stated that approval would be forthcoming if modifications were made"); *Terran v. Secretary of HHS*, 195 F.3d 1302, 1312-15 (Fed. Cir. 1999) (discretion to promulgate a revised vaccine table included the power to narrow vaccine injuries covered by the table, because the statute contained the requisite "intelligible principle" guiding agency's discretion).

3/ *See e.g. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (agency action impermissible if its scope exceeds power granted by Congress); *Bank of America v. Federal Deposit Insurance Corporation*, 244 F.3d 1309 (11th Cir. 2001) (administrative agency should attempt to conduct its actions within the statutory limits that Congress has placed on its authority, but "should have the opportunity to take full

Second, the program access statute itself gives the Commission the authority to re-enact only a partial exclusivity ban. Section 628(c)(1) requires the Commission to "prescribe regulations to specify particular conduct that is prohibited" by the program access law.[4/] The statute originally directed the Commission to adopt regulations that "prohibit exclusive contracts" between cable operators and vertically-integrated cable programmers, unless the FCC determines, according to criteria specified by Congress, that such a contract is in the public interest.[5/] The ten-year sunset provision does not eliminate the rulemaking authority in subsection (c)(1), but it does require that any rules regulating exclusive contracts after the sunset date must accord with the "necessary" standard required under Section 628(c)(5).[6/] In other words, the Commission can continue to prohibit exclusive contracts after October 5, 2002, subject to the waiver process in subsection (c)(4), but only to the extent "necessary to preserve and protect competition and diversity in the distribution of video programming."

If the Commission were categorically precluded from enacting a partial sunset, then it could be faced with the choice of either allowing the exclusivity restriction to continue in some circumstances where it is no longer necessary, or eliminating the restriction in instances where its applicability continues to be necessary to preserve competition. It is inappropriate to conclude that Congress sought such a result, given the statutory direction to re-enact the ban only insofar as it "*continues to* be necessary" (emphasis added). Indeed, the standard provided by Congress directs the Commission to effectuate a tailored solution that is neither broader nor narrower than what is required to "preserve and protect competition and diversity in the distribution of video programming."[7/]

Third, the Commission has general authority to impose appropriately tailored regulation. Even if section 628 arguably does not specifically authorize a partial sunset of the ban, the lack of explicit language would not affect the Commission's ability to tailor an option best suited to preserve and protect diversity. The Commission has authority under section 4(i) of

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advantage of that authority"); *Siegel Oil Company v. Secretary of Energy*, 208 F.3d 1366, 1371 (Fed. Cir. 2000)("we will set aside an . . . agency action only if it is in excess of the agency's authority").

4/ 47 U.S.C. § 548(c)(1).

5/ 47 U.S.C. § 548(c)(2)(D).

6/ *Cf.* 47 U.S.C. § 548(c)(5).

7/ *See Illinois Central Gulf Railroad Company v. Interstate Commerce Commission*, 720 F.2d 958, 961-62 (7th Cir. 1983) (holding that ICC authority to grant or deny state certification based upon compliance with certain Federal standards also empowered it to condition such certification on compliance with those standards in circumstances where the ICC lacked information to determine State's conformity with the Federal requirements, noting that Congress did not intend to suspend regulation in "States which expressed a genuine intent to conform to ICA standards"); *Coalition for Environment v. Nuclear Regulatory Commission*, 795 F.2d 168, 173-74 (upholding NRC's partial elimination of case-by-case review of financial qualifications and adoption of presumptions about the financial capabilities of certain types of business entities against claims that agency contravened statutory directive to take account of applicant's financial qualifications).

the Communications Act to adopt rules "not inconsistent with this Act, as may be necessary in the execution of its functions."[8/] In this case, Congress authorized the Commission to eliminate the ban unless the Commission determined that its retention was necessary. The ability to retain only that portion of the ban that is necessary to protect competition in video programming is fully consistent with – and, in fact, mandated by -- the delegated statutory authority in section 628(c)(5).

Fourth, imposition of more regulation on programming than is "necessary" would violate the First Amendment rights of programmers. Any exclusivity restriction that the Commission chooses to retain must be tailored to accord not only with the "necessary" standard in section 628(c)(5), but also with constitutional principles. Burdens on cable operators' and cable programmers' protected speech are permissible only if they "further[] an important or substantial governmental interest" and are "no greater than is essential to the furtherance of that interest."[9/]

If the Commission opts to retain the exclusivity restriction, it may do so only insofar as it is necessary to protect competition. Failure to tailor any continued exclusivity restriction to reflect the growth and competitive strength of DirecTV and EchoStar would likely not withstand constitutional muster.[10/] These constitutional considerations require the FCC to construe section 628(c)(5) as authorizing at least a partial sunset. Any other interpretation would prevent the Commission from meeting its obligation to impose the least restrictive limitation on programmers' free-speech rights, including the programmers' right to enter into exclusive distribution contracts.[11/]

8/ 47 U.S.C. § 154(i). *Mobile Communications Corp of America v. FCC,* 77 F.3d 1399, 1406 (D.C. Cir. 1996) (Section 4(i) grants to the Commission broad discretion to take those actions necessary to "ensure the achievement of the Commission's statutory responsibility"); *FCC v. WNCN Listener's Guild*, 450 U.S. 582, 596 (1981).

9/ *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2469 (1994), quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

10/ *See Time Warner Entertainment v. Federal Communications Commission et al.*, 240 F.3d 1126,1133-34 (D.C. Cir. 2001) (invalidating the cable horizontal ownership rules, in part because of failure to properly account for the "substantial changes in the cable industry" and the "impact of DBS on [cable's] market power").

11/ *See International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (when possible, statutes should be construed so as to avoid unconstitutional results); *Stroop v. Bowen*, 870 F.2d 969, 975 (4th Cir. 1989); *New England Accessories Trade Ass'n v. Tierney*, 691 F.2d 35, 36 n.2 (1st Cir. 1982).